

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:PEN:PIT:TL-N-4022-00
FAFalvo

date:

to: James Schrmack, Case Manager

from: Associate District Counsel, Pennsylvania District, Pittsburgh

subject:

[REDACTED]
Consent to Extend Period of Limitations

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ISSUE

Where the old common parent of a consolidated group merges with another corporation and goes out of existence, whether the new common parent is the proper party to execute a consent for the consolidated group.

CONCLUSION

The new common parent, [REDACTED], would be the proper party to sign a Form 872 provided it is verified that the [REDACTED] became a successor to the old common parent in a section 381(a) transaction.

BACKGROUND

All of the information set forth herein has been provided by the Examination Division. We have relied upon the written and verbal information provided by the Examination Division to render this opinion. We caution that our advice may be subject to change if the factual information provided is inaccurate.

The taxpayer, [REDACTED], ([REDACTED]) filed consolidated federal income tax returns for the taxable years ending [REDACTED], [REDACTED] and [REDACTED]. On [REDACTED], [REDACTED] was merged into [REDACTED] ([REDACTED]). On that same day, [REDACTED] went out of existence. Some of the subsidiaries of [REDACTED] stayed in existence and continue to file as part of the consolidated group. Additionally, on [REDACTED], [REDACTED] and [REDACTED] and [REDACTED] (formerly two subsidiaries of [REDACTED]) merged into [REDACTED]. [REDACTED] has filed partnership returns since [REDACTED].

Subsequent to the [REDACTED] merger, [REDACTED] and [REDACTED] formed a [REDACTED]. This trust lasted approximately one year. In [REDACTED] [REDACTED] became a wholly owned subsidiary of [REDACTED]. [REDACTED] continues to be a subsidiary of [REDACTED] and remains a part of the [REDACTED] consolidated group.

DISCUSSION

Treas. Reg. § 1.1502-77(a) provides that the common parent "shall be the sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." The common parent remains the agent for the members of the group for any years during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group at any time. Treas. Reg. § 1.1502-77 (a).

As a general rule, the common parent remains the proper party to extend the limitations period and receive notices of deficiency for any taxable year during which it was the common parent, as long as it remains in existence under state law. When any members of the group cease to exist or the members become disaffiliated, the common parent remains the agent for taxable years during which it was the common parent.

When the common parent is about to cease to exist or has ceased to exist under state law, Treas. Reg. § 1.1502-77(d) provides three rules for determining which corporation has authority to act in matters relating to the tax liability of the members of the group. The first rule is, before its corporate existence terminates, the common parent may designate another member of the group "to act as agent in its place to the same

extent and subject to the same limitations as are applicable to the common parent." This designation is subject to approval by the district director. The second rule is, if the common parent's corporate existence has already terminated, the "remaining members" may designate another member to act as agent. This designation is also subject to approval by the district director. (You have advised us that no designation has been made by the common parent or any member of the consolidated group.) The third rule provides that if no designation is made by the common parent or by the remaining members or if the district director does not approve any proposed designation, the district director may deal directly with any member in respect of its liability.

For taxable years for which the due date of the consolidated return (without extensions) is after September 7, 1988, Temp. Treas. Reg. § 1.1502-77T provides alternative agents for purposes of extending the statute of limitations or issuing notices of deficiency. Under this regulation, where the common parent of a group ceases to be the common parent (whether or not the consolidate group remains in existence) a waiver can be obtained from or a notice of deficiency issued to any one of several alternative agents. The alternative agents under Temp. Treas. Reg. § 1.1502-77T(a)(4) are:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies;

(ii) A successor to the former parent in a transaction to which section 381(a) applies;

(iii) The agent designated by the group under Treas. Reg. § 1.1502-77(d); or

(iv) If the group remains in existence after a reverse acquisition or downstream transfer, the common parent of the group at the time the waiver is given or the notice is mailed.

In this case, subparagraph (i) cannot apply because on [REDACTED], the common parent, [REDACTED], merged into [REDACTED] and no longer exists. Since [REDACTED] no longer exists, it cannot be the alternative agent for the group. In addition, subparagraph (iii) does not apply since neither [REDACTED] nor the remaining members of the old consolidated group designated another member to act as agent.

Subparagraph (a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. § 381(a) applies. As previously stated, on [REDACTED], [REDACTED] ceased to exist and [REDACTED] became the successor to [REDACTED]. Thereafter, in [REDACTED], [REDACTED] became a wholly owned subsidiary of [REDACTED]. If [REDACTED]'s merger with [REDACTED] is a reorganization to which section 381(a) applies, then [REDACTED], as successor to [REDACTED], is the alternative agent who may execute a waiver of the statute of limitations for the consolidated group. Section 381 applies to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation to which section 332 applies; or in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraphs (A), (C), (D), (F) or (G) of section 368(a)(1). We recommend that you verify applicability of section 381(a) to the merger. If section 381 does apply, [REDACTED] would be the proper entity to extend the statute of limitations for the consolidated group and an authorized officer of [REDACTED] could sign the Form 872. Although [REDACTED] is now a wholly owned subsidiary of [REDACTED], we believe this does not change its status as alternative agent.

If section 381(a) does not apply, [REDACTED] would not be deemed to be the alternative agent for the consolidated group and the Service would need to deal directly with each member of the group.

Subparagraph (a)(4)(iv) lists as an alternative agent the common parent of the group at the time the waiver is given, if the group remains in existence following a reverse acquisition (Treas. Reg. § 1.1502-75(d)(3)(i)) or downstream transfer (Treas. Reg. § 1.1502-75(d)(2)(ii)). If the [REDACTED] merger was a "reverse acquisition" within the meaning of Treas. Reg. § 1.1502-75(d)(3), the [REDACTED] consolidated group would remain in existence, and [REDACTED], as the common parent of the group at the time the waiver is given, would be the alternative agent. However, we have no information as to whether a reverse acquisition exists in this case and are unable to ascertain whether this provision would apply.

In the event [REDACTED] is considered to be the alternative agent for the group, then the caption on the Form 872 from [REDACTED] should identify the taxpayer as follows:

" [REDACTED], as successor by merger to [REDACTED], and as alternative agent for the [REDACTED] consolidated group for the group's tax years ending [REDACTED], [REDACTED] and [REDACTED]."

EDWARD F. PEDUZZI, JR.
Associate District Counsel